U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 24 2013 Office: NEBRASKA SERVICE CENTER File:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Texas Service Center. The director then served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The Administrative Appeals Office (AAO) rejected a subsequent appeal as untimely filed and remanded the case back to the director for consideration as a motion to reopen and reconsider. Upon review, the director determined that the previous decision to revoke the approval of the petition was correct. The matter is again before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).[1]

The petitioner is a manufacturer of handbags. The petitioner seeks to employ the beneficiary as a production liaison. As required by 8 C.F.R. § 204.5(l)(3), the petition is accompanied by an ETA Form 750, Application for Permanent Employment Certification (labor certification), approved by the Department of Labor (DOL).[2] The director determined that the beneficiary failed to demonstrate to the United States Citizenship and Immigration (USCIS) interviewing officer that she meets the minimum requirements of the labor certification (unable to speak English fluently); and therefore, cannot be found to be qualified for the proffered position, therefore nullifying the labor certification application. The director also determined that the beneficiary, through an interpreter, indicated at the interview her unwillingness to accept the job offer at the location stated in the petition. The director revoked the petition's approval accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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[1] The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The director's NOIR sufficiently detailed the evidence of the record.

[2] This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

In the instant matter, on the Form I-140 filed on July 13, 2007, at Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a skilled worker. The petitioner submitted a Form ETA 750 labor certification, with a priority date of January 30, 2004, which indicated at section 14 that it required two years of experience in the job offered, production liaison, or two years of experience in a related occupation, production assistant. On the Form ETA 750 the petitioner also stated at Part 15 that the beneficiary "Must be fluent in Korean and English." The director determined that the petitioner failed to demonstrate that the beneficiary was fluent in English.

Counsel for the petitioner asserts that the beneficiary is fluent in English and that she was frozen with fear at the USCIS immigration interview, rendering her speechless. The petitioner submitted affidavits from the beneficiary, her husband, her legal representative, and the interpreter who were all present on the day of the beneficiary's interview. The beneficiary's legal representative also stated that the beneficiary was able to converse with counsel in English both prior to and after the USCIS immigration interview. The affiants declare that the beneficiary failed to speak during the USCIS immigration interview out of fear and that she is conversant in English. The interviewing officer indicated that he conducted the beneficiary's interview through the aid of an interpreter and that the beneficiary did not demonstrate any ability to speak English.

To be eligible for approval, a beneficiary must demonstrate the specified qualifications found on the labor certification as of the petition's filing date (the priority date), which in this matter is January 30, 2004, onwards. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The petitioner submitted a copy of a Certificate of Enrollment from the dated February 18, 2011, which indicates that the beneficiary was enrolled in and attended the English as a Second Language (ESL) program at the school beginning November 29, 2010, with an expected completion date of December 30, 2011, and that she would attend classes four hours a day or 15 hours a week. The petitioner also submitted a copy of a written placement test (English) and a letter dated February 18, 2011 from a school official at the who stated

that the beneficiary took an English proficiency exam on November 29, 2010, and that she scored a four out of a possible six, rated as "better than proficient." This evidence demonstrates the beneficiary's written English proficiency as of November 2010. The record does not indicate that the beneficiary was tested by the USCIS specifically for her English proficiency. Under these circumstances, the AAO finds from the weight of the objective evidence that it is more likely than not that she was proficient in English as of the date of the adjustment interview. Thus, the beneficiary's poor performance at the adjustment interview may not be a basis for revocation of approval of the petition.

Nevertheless, the issue of the beneficiary's fluency in English is required by the terms of the labor certification. No evidence of record demonstrates that she was fluent in the English language, as required by the petitioner on the Form ETA 750 at part 15, as of the priority date, January 30, 2004. The AAO notes that the beneficiary first moved to the United States in 2003, one year before the priority date, and there is no evidence of record that she studied English in Korea or the United States or that she was fluent in English as of the priority date. Based upon the evidence in the record of proceeding, the AAO finds that it is more likely than not that the beneficiary was not fluent in English as of the priority date. As the petitioner has not had the opportunity to address the beneficiary's fluency before the 2004 priority date, this finding will not be the basis for dismissing the appeal. In any further proceedings, the petitioner must establish the beneficiary's English proficiency as of the 2004 priority date.

A second issue raised by the director is whether the Form I-140 is offering a position which differs materially from the certified job opportunity. The petitioner must demonstrate that the petition is supported by a valid labor certification from the DOL pertaining to the job offered by the petitioner in New York. According to 20 C.F.R. § 656.30(c)(2), a labor certification for a specific job offer is valid only for the particular job opportunity and the area of intended employment stated on the Application for Alien Employment Certification, Form ETA 750. The Form ETA 750 indicates that the employment opportunity is located in New York, New York. However, the director indicated that the USCIS immigration officer stated that during the interview dated December 16, 2010, the beneficiary refused to accept the proffered position at the location stated in the instant petition. Counsel who was present during the interview stated that the beneficiary never expressed a refusal to accept the proffered position at the location stated in the petition.

The petitioner submitted a letter dated November 17, 2010 in which the president, Robert Chun stated:

> The time difference between New York and Pacific Asia ranges from 10 to 12 hours; it is impossible to communicate with our manufacturers effectively within acceptable office hours. However, if our liaison were working out of an office on the West Coast, her evening shift hours would coincide with the morning hours in Korea and China.
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> For this reason, logistics dictate that we utilize an office on the West Coast. We have an agreement with our affiliate company,

> CA, that, should Ms. be granted her adjustment of status, she would work out of an office in their building in Los Angeles.

Based upon the petitioner's letter, the AAO finds that the petitioner intends to employ the beneficiary in California and not in New York. Accordingly, the job being offered to the beneficiary is in California. As such, the petition is not accompanied by a valid labor certification.[3]

Counsel on appeal infers that 180 days has passed since the petition was approved and therefore, the beneficiary is allowed to port to a same or similar job in California. Although section 204(j) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(j), provides that an employment-based immigrant visa petition shall remain valid with respect to a new job if the beneficiary's application for adjustment of status has been filed and remained unadjudicated for 180 days, the petition must have been "valid" to begin with if it is to "remain valid with respect to a new job." *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010). To be considered valid in harmony with related provisions and with the statute as a whole, the petition must have been filed for an alien who is entitled to the requested classification and that petition must have been approved by a U.S. Citizenship and Immigration Services (USCIS) officer pursuant to his or her authority under the Act. An unadjudicated immigrant visa petition is not made "valid" merely through the act of filing the petition with USCIS or through the passage of 180 days. *Id.*

In cases where the underlying I-140 approval was not valid to begin with, such as in cases of fraud or willful misrepresentation, or where the I-140 was approved in error by USCIS because either the petitioner or the beneficiary did not qualify for the preference classification sought, a revocation under section 205 will negate any claim to section 204(j) portability. In *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009), the Ninth Circuit Court of Appeals determined that the government's authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff's argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs. Under the plaintiff's interpretation, an applicant would have a very large incentive to change jobs in order to guarantee that the approval of an I-140 petition could not be revoked. *Id.*

Beyond the decision of the director, the petitioner has not established that the beneficiary is

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[3] It is further noted that the beneficiary has resided in California and is raising a family there. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the proffered job, production liaison, or two years of experience in a related occupation, production assistant. The beneficiary set forth her credentials on the labor certification application and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, she represented that she was employed by as a production manager/assistant-handbags from March 1995 through May 2001.[4] She does not provide any additional information concerning her employment background on the labor certification.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains an employment certificate from the president of who stated that the company employed the beneficiary from September 1997, and that she worked as a handbag, backpack and accessory assistant manager from May 1998 to June 2001, when she was promoted to production manager, and that she resigned in April 2003. The beneficiary could not have been promoted to production manager in June 2001 if she ceased working for the employer in May 2001. The beneficiary indicated, under penalty of perjury, on the labor certification that she was employed by from March 1995 through May 2001. It is further noted that the beneficiary stated on the Form G-325A, Biographic Information application that she signed on September 2, 2010, that she was employed by as a production assistant from March 1995 to May 2001. There has been no explanation given for the multiple inconsistencies found in the record. Further, the letter fails to specify a description of the

[4] The initial beneficiary, under penalty of perjury, identified the same employer, as his employer, and specified the identical job title, job description and dates of employment as the beneficiary. There has been no explanation given for this coincidence. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho* at 591.

beneficiary's job duties. The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. For this additional reason, the petition's approval may not be reinstated.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The director's prior decision dated May 16, 2012, revoking the petition is affirmed. The petition remains revoked.